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No. 87-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Petitioner,

v.

PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICI CURIAE*, THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION, IN SUPPORT OF PETITIONER (FILED WITH WRITTEN CONSENT)

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QUESTIONS PRESENTED

1. Whether, in a case raising an unprecedented conflict between the First and Fourth Amendments, a federal court has the authority to enter a temporary restraining order enjoining a newspaper from publishing illegally obtained information in order to preserve the status quo and thereby prevent publication from mooting the controversy.

2. Whether a newspaper may be held in criminal contempt for willfully violating a court order, temporarily prohibiting it from publishing illegally gathered information, that is later declared to be invalid.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C. WLF engages in litigation, administrative proceedings, and policy advocacy in support of the constitutional values upon which America was founded.

The Allied Educational Foundation ("AEF"), established in 1964, is a non-profit, charitable and educational foundation based in Englewood, New Jersey. It is devoted to the pursuit of knowledge, education, and the broad public interest.

Both the Washington Legal Foundation and the Allied Educational Foundation are committed to the preservation of a strong and independent judiciary. In line with that objective, each organization has devoted a substantial portion of its resources to legal activities designed to maintain the integrity of the courts. For example, WLF has participated in cases supporting the constitutionality of the Judicial Conduct and Disability Act of 1980. *Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987). It has also filed complaints under the Judicial Conduct Act seeking sanctions for conduct prejudicial to the effective administration of the courts.

WLF's and AEF's interest in preserving an effective judiciary are further reflected in their publications on this subject. Over the last five years WLF has continuously published its *Court Watch Manual: A Citizen's Guide to Judicial Accountability.* Designed and distributed for grass-roots use, this 111-page *Manual* describes the criminal justice system, the procedures for state and federal judicial appointments, and the way in which the average citizen can actively participate in the administration of justice. WLF and AEF have together also published *Capital Punishment 1986: The Last Lines Of Defense*, a 35-page report examining the judicial administration of capital punishment in recent years.

WLF and AEF are additionally concerned about preserving the effective administration of justice in the face of exaggerated constitutional claims advanced under the banner of the First Amendment. Thus, for example, AEF and WLF have filed joint *amici curiae* briefs with

this Court in cases involving First Amendment challenges to the government's power to regulate foreign propaganda and exclude hostile aliens on national security grounds: *Meese v. Keene*, 55 U.S.L.W. 4586 (1987) and *Reagan v. Abourezk*, 56 U.S.L.W. 4001 (October 19, 1987). *Amici*'s purpose in participating in those cases, as here, stems from a desire to ensure that overly broad constructions of the First Amendment are not used to restrict other liberties no less precious to the preservation of our democratic process.

Amici's particular interest in this case derives from a concern that the institution of the judiciary may be irreparably weakened unless the First Circuit's holding is reversed and the finding of criminal contempt against the Providence Journal and its editor (hereinafter referred to collectively as either "the Journal" or "respondents") is reinstated. The Journal's conduct in disobeying a lawfully issued temporary restraining order evidenced a total lack of respect for the judicial process. However much courts are charged to safeguard core First Amendment values, they plainly also have a paramount duty to (a) protect the orderly administration of the judicial process and (b) preserve their own authority. Fidelity to the First Amendment simply does not compel a federal court to rush to make constitutional adjudications or to meekly accept deliberate violations of its orders.

In *amici*'s view, the deliberate refusal of the Journal to obey the district court's order strikes directly at the ability of all courts—including this one—to faithfully discharge their duties and responsibilities. We therefore appear here in order to have vindicated the time-honored rule that court orders, even those subsequently declared unconstitutional, must nevertheless be obeyed until set aside or modified on appeal. To argue as respondents do that a newspaper may willfully and deliberately disregard a binding court order with impunity—an order

entered to preserve a litigant's right to secure meaningful judicial review—is to mock the very idea of justice. It is to replace the rule of law with the rule of private fiat.

Freedom of the press is not an absolute right. Its proper scope depends upon the context in which it is asserted. Here, a complaint was filed against the Journal raising serious statutory and constitutional claims; a TRO was issued after a preliminary hearing to preserve the status quo. Rather than comply with the order or, at the very least, manifest some degree or respect for the law by filing a motion to vacate, the Journal simply ignored it. In so doing, it thereby allowed its publication of the enjoined material to effectively moot the controversy that was pending before the trial court.

Of course, the Journal now seeks to justify its willful violation of the law by labeling the court order a "prior restraint." Yet, even admitting that certain modest First Amendment interests were at stake, it simply will not do to "solve" this case through recourse to short-hand phrases. Although freedom of the press is precious, even "the most prized liberties presuppose an independent judiciary through which these liberties may be . . . vindicated." *United States v. United Mine Workers*, 330 U.S. 258, 311 (1947) (Frankfurter, J., concurring).

Respondents and their supporting press *amici* have come before this Court to stress the importance of the First Amendment over all other competing interests. By articulating why the public interest requires this Court to preserve the ability of federal judges to decide cases and to punish for willful contempt, *amici* hope to redress this argumentative imbalance and thereby assist the Court in reaching a more informed judgment. *Amici's* brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.1.

STATEMENT OF THE CASE

Amici adopt by reference the complete statement of the case contained in petitioner's brief on the merits. However in order that the legal arguments advanced in this brief may be more fully understood, *amici* offer the following factual summary of events.

On Friday, November 8, 1985, Raymond J. Patriarca ("Patriarca") brought an action against the Federal Bureau of Investigation ("the FBI"), the Providence Journal Company ("the Journal"), *et alia*, in federal district court for the district of Rhode Island. Patriarca's complaint was based upon the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-21, and the Fourth Amendment to the United States Constitution. It alleged that the FBI had wrongfully released 20-year-old logs and memoranda to the Journal which (a) implicated Patriarca's privacy rights and (b) had previously been held to have been illegally gathered in violation of the Fourth Amendment. *See Providence Journal Co. v. FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). In a Motion for Temporary Injunctive Relief filed contemporaneously with the complaint, Patriarca petitioned the district court to issue an order enjoining the Journal from publishing any articles relating to the logs and memoranda at issue in his complaint.

On Tuesday, November 12, 1985, Patriarca's summons, complaint, and motion were served on the Journal. The next day, the district court met in chambers with counsel for all parties to consider Patriarca's request for a temporary restraining order. After hearing argument from counsel, the court granted the TRO. In so acting, the court expressed concern "that unless the status quo was maintained for a time until [it] could sort out the various contentions, there would be no status to preserve,

and publication would make the matter moot." *Patriarca v. FBI*, 630 F. Supp. 993, 998 (D.R.I. 1986). In other words, the court wished to have an unhurried opportunity to consider the serious legal issues that had been presented to it and thereby preserve Patriarca's right to have effective judicial review of his claims.

After issuing the temporary restraining order, the court offered to hear counsel in open court the following morning, Thursday, November 14, 1985, on whether its restraining order ought to be lifted. However, counsel for the Journal advised the court that the newspaper needed until Friday, November 15, 1985, in order to proceed with the case. Accordingly, a hearing was set for that date. At no point during the November 13th chambers conference did counsel for the Journal state or suggest that they would publish in defiance of the court's temporary restraining order.

However, on Thursday, November 14, 1985—the day after the district court had granted the Journal's request for an additional day to respond to Patriarca's constitutional claims and while the court's temporary restraining order was still in full force and effect—the Journal published an article concerning Patriarca based on the illegally gathered information the FBI had disseminated to it. The Journal article on Patriarca, published November 14, 1985, appeared on the paper's front page. The banner headline above the article stated, "Court, Journal Clash Over Use Of Tapes." The sub-heading proclaimed, "Despite ruling on Patriarca suit newspaper decides to print excerpts from FBI recordings." In the view of the First Circuit, "From all appearances, the Journal used the presence of the court order [restraining publication] to bolster the importance of the Patriarca story." *In The Matter Of Application To Adjudge The Providence Journal Company And Its Executive Editor, Charles M. Hauser, In Criminal Contempt*, 820 F.2d 1342, 1353 n.75 (1st Cir. 1986).

The Journal's rationale for violating the court's order, as stated in its November 14 article, was "the Constitution's guarantee of a free press." The Journal has not contested or denied the fact that its action constituted a willful and deliberate violation of the court's order.

Post-publication, Patriarca filed a motion to judge the Journal in contempt. When he declined to prosecute the criminal contempt motion, the district court invoked Fed. R. Crim. P. 42(b) and appointed a special prosecutor. Following a hearing, the district court found the Journal to be guilty of criminal contempt. The court subsequently imposed an 18-month jail sentence on the Journal's publisher, Charles M. Hauser, which was later suspended and reduced to 200 hours of community service. The Journal was fined $100,000.

On appeal, the U.S. Court of Appeals for the First Circuit reversed the criminal contempt conviction. While recognizing that "court orders are accorded a special status in American jurisprudence" and that, in order to protect the rightful power of the courts, "there is a heavy presumption in favor of [their] validity," 820 F.2d at 1347, the appeals court nevertheless held that the district court's order had been "transparently invalid" and constituted a "presumptively invalid prior restraint." *Id.* at 1353.

A suggestion for rehearing en banc was granted and a three paragraph *per curiam* opinion later issued in which the *en banc* court affirmed the panel's opinion modifying it in minor details only. 820 F.2d 1354-1355.

SUMMARY OF ARGUMENT

1. The district court properly issued a temporary restraining order. At the time the instant case arose the trial court was presented with serious constitutional questions involving, *inter alia*, a newspaper's right of access to and potential publication of illegally gathered information and a private citizen's right of privacy. Nothing in the First Amendment to the Constitution forbids a trial court from issuing a TRO in order to (a) preserve the status quo; (b) prevent irreparable harm from occurring to a private litigant; (c) preserve the court's right to adjudicate the controversy before it; and (d) avoid a rush to constitutional adjudication.

2. Respondents' claim that they cannot be punished for willfully disobeying a lawfully issued court order is invalid. The federal district court was entitled to preserve the status quo pending the court's resolution of the jurisdictional issues before it. Further, the court had subject matter jurisdiction and personal jurisdiction over all parties to the dispute. Hence, the order it issued was entitled to be obeyed even though it was subsequently held to be invalid on appeal.

3. Respondents' prior restraint theory of this case is incompatible with previous holdings of this Court establishing that the willful refusal of a party to obey a binding court order is punishable as criminal contempt. The talismanic invocation of the phrase "prior restraint" does nothing to alter respondents' contumacious conduct. Moreover, it does not in any way mitigate respondents' open defiance of the authority of the trial court to argue that press freedoms were at stake. To allow the authority of a federal court to be flouted in the name of the First Amendment is to reject the requirements of the judicial process and the rule of law upon which all liberties, including those guaranteed by the First Amendment, depend.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ISSUED A TEMPORARY RESTRAINING ORDER TO PRESERVE THE STATUS QUO

This appeal raises the important question of whether the First Amendment forbids a federal district court from issuing an order temporarily restraining a newspaper from publishing material in order to have adequate time to review and assess complex constitutional issues. As a practical matter, it poses the equally serious question of whether the federal judiciary is powerless to deal with willful contempt of its orders by the press whenever a colorable First Amendment claim may be advanced as a defense.

A century ago it may have approached hyperbole for Warren and Brandeis to suggest that the press was everywhere overstepping the bounds of propriety and needed to be restrained. Warren and Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890). Today, however, at a time when the press deems it axiomatic that it may publish whatever it pleases, whenever it pleases, such a suggestion is no longer easily dismissed.

Respondents, the Providence (Rhode Island) Journal and its editor, Charles M. Hauser, are vivid proof of this. Having been sued under a general invasion of privacy theory, they appeared in court to argue against the issuance of a TRO intended to preserve the court's ability to hear the case. When respondents lost this argument and a binding court order temporarily blocking publication issued, they did not make any effort to have the court's order dissolved or modified. They did not seek to notify the court of their intended course of action. They did not wait 48 hours until the hearing date on which counsel for the paper had already agreed to argue their case in full. Instead, respondents unilaterally arrogated to themselves the right to terminate the lawsuit by publishing the material the court had ordered them not to.

Given these circumstances, the district court was justified in having the Journal prosecuted for criminal contempt. "Although its statements professed respect for the Judge, its words and actions were those of utter defiance of the constitutional system of justice." 630 F. Supp. at 1000. The court properly concluded that it had lawful authority to resolve the controversy Patriarca had placed before it and that the restraining order in question—duly entered after a chambers conference with counsel for all parties in attendance—was equally lawful and entitled to obedience. Accordingly, the trial court found the Journal in contempt and reaffirmed the well established principle that an injunction duly issuing out of a court having subject matter and personal jurisdiction must be obeyed until reversed either by itself or by a higher court on appeal.

But respondents contend that this principle no longer holds true if a contemplated court injunction affects press publication. They argue that the First Amendment somehow limits the ability of a federal judge to control the conduct of parties to a lawsuit in matters affecting the substantive issues of the suit—matters that bear directly upon the court's inherent ability to pass any ultimate judgment on those issues. Vigorously disavowing any disrespect for the judicial system, respondents successfully argued below for the adoption of a new rule of law that would allow any party to a lawsuit to ignore a "transparently invalid" order affecting speech.

But this argument fails (among other reasons advanced below) because it overlooks competing constitutional values of equal or greater significance. As this Court recognized in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911), and has oftentimes reaffirmed in subsequent decisions, *e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 290 n.56 (1947):

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act

> of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.

Moreover, respondents' First Amendment analysis of the district court's action is flawed in several respects. The authority of a federal court to punish for contempt in situations when press publication directly tends to prevent the proper discharge of the court's judicial duties has not normally been reviewed under this Court's prior restraint line of precedent. *See, e.g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 557 n.5 (1976) (contempt proceedings involving out-of-court publications relating to a pending case raise "problems *substantially different* from those raised by prior restraint [cases]" (emphasis added)). Further, the authority of federal courts to punish for contempt in circumstances analogous to those *sub judice* has been repeatedly vindicated by this Court. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911); *Howat v. Kansas*, 258 U.S. 181 (1922); *United States v. United Mine Workers*, 330 U.S. 258 (1947) and *Walker v. City of Birmingham*, 388 U.S. 316 (1967).

Even if modest First Amendment values may be implicated here,[1] respondents seek to give far broader scope to their liberty to publish under these circumstances than this Court has ever recognized. Although freedom to publish should be given a wide berth, publication may at times be subordinated to "the essential requirement of fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946). In this instance, a finding of criminal contempt was appropriate in light of the fact that the Journal's publication directly inter-

[1] That the publication in question involved speech of a modest value is clear from the fact that it: (a) had been illegally gathered (b) was over twenty years old and (c) concerned private, non-political speech.

fered with the trial court's ability to discharge its judicial duties.

> The power of a court to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decisions would be only advisory.

Gompers v. Buck's Stove & Range Co., 221 U.S. at 450.

In the end, respondents' arguments constitute little more than a contrived constitutional claim of special privilege which would leave the federal judiciary powerless to prevent press publications no matter what the magnitude of the competing interests at stake.[2] The district court properly rejected this approach and in so doing aptly summarized the principles which should govern the disposition of this case:

> The judicial power of the United States is vested in the courts by Article III of the Constitution. The courts have the right to determine controversies between litigants. *Muskrat v. United States*, 219 U.S. 346, 361, . . . (1911); *General Investment Co. v. New York Central Co.*, 271 U.S. 228, 230, . . . (1926). The Court has, as an ancillary power, the authority to punish for contempt. *Michaelson v. United States*, 266 U.S. 42, 65-66, . . . (1924).
>
> In this instance the Journal seized the judicial power to itself. This is a serious controversy involving prior court determinations and conflicts between constitutional principles. Although the order might ultimately be held to be invalid, there is enough substance to it to expect law abiding persons to respect it at least briefly. The Journal showed no respect whatsoever, and, therefore, it must be found in contempt of the order entered November 13, 1985.

Patriarca v. FBI, 630 F.Supp. at 1004.

[2] For example, one might easily imagine another Pentagon Papers case arising in which claims of national security are again pitted against the press' right to publish. In the Pentagon Papers case, the *New York Times* abided by a court order restraining publication. Moreover, there seemed to be a general agreement among the members of this Court that even though the court's order was defective, it had been proper for the *Times* to obey it. *See generally, New York Times Co. v. United States*, 403 U.S. 713 (1971). However, these assumptions would be cast into grave doubt were the Court to find in favor of respondents.

A. Weighty Issues Of Statutory And Constitutional Law Were Presented To The Court For Resolution

Respondents have argued below and may be expected to argue here that the jurisdictional claims advanced by the plaintiff in his lawsuit against the Journal were frivolous. Consequently they contend that the district court lacked subject matter jurisdiction over this dispute—a state of affairs which would effectively preclude any possible contempt conviction for disobeying the court's restraining order.

However unless this Court is prepared to ignore binding precedent and contemporary realities about the severe time constraints facing federal judges, it must reject respondents' argument. Respondents' suggestion as to the patent frivolity of Patriarca's claims can hardly be taken seriously in light of the fact that when first made, counsel for the Journal requested additional time to be able to respond adequately to them. Moreover, at no point prior to the contempt proceeding being initiated did counsel for the Journal present to the district court any authority relevant to the jurisdictional issue—a fact hardly indicative of an obvious lack of jurisdiction for Patriarca's claims. *Patriarca v. FBI*, 630 F. Supp. at 999; 1002.

More to the point, the jurisdictional argument proposed by respondents rests upon a fundamental misconception of the judicial function in dispute resolution. Where, as here, a lawsuit is filed and a temporary re-

straining order is sought, a court is necessarily forced to render an immediate ruling. At such a time, and as the district court correctly observed, "no court is charged with instantaneous knowledge of all applicable precedent." *Id.* at 999. For this reason, the proper course of action for the court to pursue was to avoid a rush to constitutional adjudication by granting the requested order, thereby preserving the status quo. In this way, the court properly allowed itself the opportunity for unhurried reflection upon the weighty issues presented to it.

It is instructive to note that this Court has routinely sanctioned such an approach even if it is subsequently determined that the court lacked jurisdiction of the case. *United States v. United Mine Workers*, 330 U.S. at 291 (1947). The rationale underlying this approach has been most clearly articulated by Justice Frankfurter in his concurrence in the *United Mine Workers* case:

> [N]o type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide. Controversies over "jurisdiction" are apt to raise difficult technical problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party.

Id. at 309.

All of these considerations figured prominently in the trial court's ruling. Moreover, the district court had the inherent authority, from the necessity of Patriarca's complaint being filed with it, to rule on the jurisdictional issues and to enter any orders it deemed proper in order to preserve the lawsuit for its subsequent resolution.

Far more significantly, Patriarca's claims to jurisdiction were not frivolous. Patriarca asserted three such bases: the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552; the Omnibus Crime Control and Safe

Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* ("Title III"); and the Fourth Amendment to the U.S. Constitution.

Admittedly, Patriarca's claim under FOIA to restrain the disclosure of information by the Journal was questionable. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), this Court rejected arguments that such a "reverse FOIA" action might be founded on the FOIA. However, the Court did resolve that a reverse FOIA action such as Patriarca sought to achieve might properly be based on Section 10(a) of the Administrative Procedure Act, 5 U.S.C. Sec. 702 (1976). *Id.* at 317. Thus acting pursuant to its inherent equitable powers, the trial court may have entertained such a claim or allowed Patriarca to amend his complaint to assert a more proper cause of action.

As for Patriarca's Title III claims, the First Circuit had already ruled in *Providence Journal Co. v. FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980), that the disclosure of the information the Journal possessed would violate Title III as a disclosure of unlawfully obtained information. Thus this claim was not patently frivolous.

As for Patriarca's Fourth Amendment claim, this duplicated the view propounded by a federal court that had earlier considered this question. In *Providence Journal v. FBI*, 460 F.Supp. 762 (D.R.I. 1978), that court stated:

> Because the fourth amendment protects persons against intrusion on private places and conversations, even those carried on in the most public of phone booths, it surely follows that the fourth amendment has something to say about the reasonableness of the uses to which the state puts the seized information. Forbidding the state to wiretap a conversation, but providing no remedy when it not only wiretaps but discloses the contents of the conversation to the pub-

> lic would be to recognize a constitutional right without a concomitant remedy. For if an initial intrusion invades privacy, the public disclosure of what is seized destroys it altogether. Moreover, without this penumbral protection for the seized information, the core fourth amendment right to be free of the initial intrusion would be less secure.

460 F. Supp. at 771.

In light of the fact that a federal court had earlier voiced support for the type of Fourth Amendment privacy claim that Patriarca was advancing, it is clear that invoking the district court's jurisdiction under this theory was not patently frivolous.

B. Press Publication Would Have Mooted The Controversy And Divested The Plaintiff Of His Right To Judicial Review

It is an elementary principle of our system of justice that federal courts have broad and inherent power to prevent abuse and to do substantial justice to parties who come before it seeking judicial redress. *RFC v. Providence S. A. Group*, 311 U.S. 579, 582-583 (1941). *See generally*, 1 Moore's Federal Practice, ¶ 0.60 [6] and cases cited therein. One of these inherent powers is the ability to issue injunctions to hold matters in status quo pending a determination of such issues as whether jurisdiction properly lies before the court.

In the instant case, Patriarca sought injunctive relief to prevent the disclosure of illegally obtained information violative of his privacy rights. In considering Patriarca's request for a restraining order, the trial judge first met with counsel for all parties before contending that serious legal issues were presented. In issuing the TRO, the court concluded that the Journal would not suffer irreparable harm. It further correctly recognized that failure to grant the injunctive relief would entirely destroy

Patriarca's right to secure meaningful judicial review of his privacy claims. Stated differently, unless the status quo were maintained via the court's order, publication by the Journal would terminate the lawsuit.

A second valid reason for issuing the injunction was to avoid a rush to constitutional adjudication. The lower court needed an opportunity to consider and react to the novel claims that were presented to it. In the apt words of the trial judge, "Courts simply cannot function as 'drive in' businesses if the quality of the judicial product is to be worthwhile." *Patriarca v. FBI*, 630 at 999.

Unless this Court is prepared to find that it is clearly erroneous for a federal court to issue an injunction to preserve the status quo so that: (a) a litigant's right to secure effective judicial review of his claims is preserved and (b) the court may have adequate time to consider novel constitutional issues, it must reaffirm the district court's decision to issue the temporary restraining order and its subsequent finding of contempt.

II. THE DISTRICT COURT PROPERLY HELD THAT WILLFUL VIOLATION OF ITS TEMPORARY RESTRAINING ORDER WAS PUNISHABLE BY CRIMINAL CONTEMPT

Since the district court properly had subject matter and personal jurisdiction over the parties to this controversy, it makes no difference that its order affected Journal *qua* a newspaper asserting a First Amendment right to publish. It is clear that the First Amendment has never been interpreted to invalidate every burdening of the press that may result from governmental actions designed to secure the fair administration of justice. *See e.g., Branzburg v. Hayes*, 408 U.S. 667, 681-685 (1972) and cases cited therein. Nor does the First Amendment grant the press special rights in excess of those afforded to the public generally. *Id.* at 684; 704. If the members

of one group may be held in criminal contempt for willful violation of a court order, so may members of the other.

For purposes of legal analysis, the only relevant inquiry is whether the court issuing the orders: (a) had subject matter and personal jurisdiction over the controversy; (b) allowed adequate and effective remedies for orderly review of the ruling; and (c) did not require an irretrievable surrender of a party's constitutional rights. *Walker v. City of Birmingham*, 388 U.S. 307, 319 (1967). If these three conditions obtained, then the contempt proceeding must be adjudged valid *even if* the underlying order is set aside on appeal as unconstitutional. *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947). This point is of longstanding origin and is firmly established in the Court's precedents. *See e.g., Worden v. Searls*, 121 U.S. 14 (1897).

That the district court had subject matter and personal jurisdiction over the controversy has been discussed above and will not be repeated here. As for the availability of adequate review of the court's order, the record offers no support for any conceivable claim of delay or obstruction on the part of the trial judge. On the contrary, the plain fact is that the Journal deliberately decided to disobey the court's order within hours of its issuance. It never had the slightest intention of testing the restraining order's validity through established judicial processes.

Lastly, the surrender of First Amendment freedoms that the Journal would have been compelled to undergo had it obeyed the court's order was minimal and "retrievable." Indeed, had counsel for the Journal not requested to extend the original date that had been contemplated for hearing arguments on the validity of the court's injunction, it may have been possible to have had the court's order vacated in time to publish on the very same day as the Journal actually did.

Three options were available to the Journal below. It could have complied with the district court's order and thereby accepted the temporary restraint that was imposed on it for 48 hours until the scheduled hearing could occur. Secondly, it could have immediately asked the trial judge to reconsider his order or appealed the order directly. By choosing this route, the most it would have lost in obeying the order was one day. Lastly, the Journal was free to publish in the face of the order—but, as indicated, at the price of forfeiting its right to object to the constitutionality of the order. "One who defies the public authority and willfully refuses his obedience, does so at his peril." *United States v. United Mine Workers*, 330 U.S. at 302. The Journal took such a calculated risk and should not now be heard to complain because it is being punished as a result.

A. Prosecution For Criminal Contempt In This Context Does Not Constitute An Unconstitutional Prior Restraint On Speech

Throughout the course of this litigation, respondents have cloaked their arguments in the attractive and familiar garb of the First Amendment. They routinely begin with the unassailable proposition, first articulated by the Court in *Near v. Minnesota*, 283 U.S. 697, 713 (1931), that one of the main purposes of the First Amendment is "to prevent previous restraints upon publication." Subtly and swiftly, they then shift their arguments to the astonishing proposition that court orders enjoining publication in the interests of preserving the status quo in a pending case in some way epitomize all the evils of prior restraint that this Court has inveighed against over the past half century.

Thus respondents display an uncritical tendency to treat this case as if it were on all fours with various prior restraint cases—which it patently is not. At the same time they gloss over the relevant case law uphold-

ing the power of judges to issue such injunctions and to punish by contempt out-of-court activities tending to obstruct the orderly administration of justice. *E.g.*, *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

But no matter how much respondents may lecture this Court on the evils of prior restraints, this case is not so easily resolved as that:

> [T]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of close analysis and critical judgment in applying the thought behind the phrase [necessitates] . . . 'a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'

Kingsley Books v. Brown, 354 U.S. 436, 441-442 (1957), *quoting* Freund, "The Supreme Court and Civil Liberties," 4 *Vand. L. Rev.* 533, 539 (1951). In contrast to respondents' farfetched analogies, "a pragmatic assessment" of the district court's order, considered in the context of the germane jurisprudence, leads inevitably to the conclusion that no First Amendment guarantees were violated.

It is important to recall at this point that judicial injunctions bear little resemblance to the types of administrative preclearance or licensing schemes that this Court has normally castigated as prior restraints. *E.g.*, *Freedman v. Maryland*, 380 U.S. 476 (1957); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Indeed, in certain decisions this Court has sustained criminal contempt sentences against claims that the underlying judicial injunction abridged the First Amendment without ever once invoking the prior restraint doctrine. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Such decisions are consistent with the view held by a longstanding majority of this Court that because court-

ordered injunctions involve the authority of the courts they should not automatically be classified as prior restraints and thereby receive special disfavored treatment under the First Amendment. *E.g.*, *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 390 (1973); *Nebraska Press Associaiton v. Stuart*, 427 U.S. at 557 n.5.

Court-ordered injunctions also provide litigants with a panoply of rights and procedural protections absent from typical licensing schemes. In this instance, for example, the parameters of the injunction were narrowly drawn and quite specific. They related exclusively to preserving the status quo so that the underlying lawsuit would remain ripe for judicial resolution. Moreover, counsel for the Journal appeared in the court's chambers and were heard in argument against the grant of injunction. In addition, there was no less restrictive alternatives for the court to pursue if it wished to preserve judicial review over Patriarca's claims.

Focusing on the particularities of the speech affected by the court's injunction is also dispositive of respondents' prior restraint argument. Unlike most prior restraint cases, the speech at issue did not "fall[] upon the communication of news and commentary on current events." *Nebraska Press Association v. Stuart*, 427 U.S. at 559. On the contrary, the Journal's story was based upon information that was not "news" in any meaningful sense of the word; it involved events that occurred over twenty years ago. Nor did the story concern political speech, which this Court has held to be subject to the most vigorous protection against restraints. *Near v. Minnesota*, 283 U.S. 697, 699 (1931). Rather, it was based upon illegal wiretaps that were previously determined by a court of law to have constituted an invasion of privacy and concerned such trivial matters as Patriarca's "difficulties in school and with his friends both male and female." *Patriarca v. FBI*, 630 F. Supp. at 995.

The Court should also pause to consider how costly in terms of the First Amendment the impact of the delay in publication created by adherence to the court's injunction would have been. The district court was prepared to lift its TRO on the very next day following its issuance. It was only acting in accordance with the wishes of the Journal's counsel that the injunction was placed in effect for a period of 48 hours. More to the point, time was not of the essence for a story that involved two-decade's old events.

In light of the reduced constitutional value of speech that was affected (i.e., it did not involve matters of public concern), and the fact that, had the injunction been obeyed, its effect on the story's impact would have been inconsequential, it must be seen that the district court acted properly.

Even if this Court concludes that the district court's injunction did function as a prior restraint, its analysis should not automatically end with a finding of unconstitutionality.

> This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) . . . ; *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) . . . ; *Near v. Minnesota*, 283 U.S. 697 (1931).

Nebraska Press Association v. Stuart, 427 U.S. at 570. In that event, the Court must then determine whether the power of federal courts to issue injunctive orders in order to preserve the independence of the judiciary constitutes one of those valued interests the "protection of which may in some instances justify limitations on First Amendment freedoms." *Elrod v. Burns*, 427 U.S. 347, 368 (1976). Given that this Court's past rulings have consistently recognized the compelling nature of this interest, there can be little doubt that in resolving the conflict between the district court's injunction and the Journal's publication rights, the former must be found to be more important. "[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give meaning to constitutional freedoms." *Walker v. City of Birmingham*, 388 U.S. at 321.

B. The First Circuit's Holding Is Insupportable And Will Serve To Undermine The Orderly Administration Of Justice

The First Circuit's reversal of the criminal contempt sentences imposed by the district court demonstrates a profound number of misconceptions. These relate first of all to the perceived burden on First Amendment rights effectuated by the lower court's order restraining publication and, secondly, to the necessarily wide discretion afforded trial judges in attempting to administer justice fairly among litigants who seek judicial redress.

As demonstrated above, the First Amendment interests advanced by respondents as grounds for disobeying the court's order are relatively insubstantial. Viewed fairly, they simply fail to support the claim that immediate publication was necessary or that the modest delay created by the district court's injunction constituted an intolerable abridgment of the Journal's press freedoms. Curiously enough, although the First Circuit's opinion repeatedly acknowledges that obeying court orders is the "sine qua non of orderly government," it eagerly embraced respondents' press freedom claims, thereby refusing to allow its inquiry to advance beyond the fervid rhetoric of prior restraint into a more discriminatory factual analysis.

More important, the appeals court clearly erred in holding that a "transparently invalid" court order affecting speech may be willfully ignored by a party subject to that court's jurisdiction. In further suggesting that

this newly-minted rule would not "lead to widespread disregard of court orders," the First Circuit panel was not merely blinking at applicable precedent but at reality.

First, this Court and others have repeatedly stressed that so long as a federal court has jurisdiction over the parties and the subject matter of the controversy its orders *must* be obeyed until modified or vacated by that court or on appeal. *Walker v. City of Birmingham*, 388 U.S. 307, 319-21 (1967); *United States v. United Mine Workers*, 330 U.S. 258, 290-983 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973); *American Federction of Musicians v. Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954). This is longstanding, black letter law which in itself mandates reversal of the First Circuit's holding.

Further, the First Circuit's departure from existing precedent will inevitably produce judicial chaos. The whole purpose of the requirement that a party subject to a court order must abide by its terms or face contempt is to ensure that the judicial power is not usurped by private litigants to a dispute. Yet precisely such an undesired result must occur if each party is to be left free to determine when a court has jurisdiction over it, when it "arguably" has avenues of appellate relief available to it, and when a court order in question restraining it from certain actions is "transparently invalid." Importing such loosely worded, subjective standards into the judicial process encourages each party to "be judge in his own case." It is simply naive for the First Circuit to assert otherwise.

This is not to say that all court orders are sacrosanct. Clearly an order entered by a court without proper juris-

diction over the parties or the subject matter is not entitled to deference. However:

> Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper.

United States v. United Mine Workers, at 309-310 (Frankfurter, J., concurring).

In the case at hand, the trial court clearly was not "traveling outside its orbit"—a fact even the First Circuit recognized in stating that the issues propounded on appeal "admitted of no easy solution." *In The Matter Of Application To Adjudge The Providence Journal In Contempt*, 820 F.2d at 1345. It was wrong for the Journal to take the law into its own hands. Its punishment for criminal contempt must therefore be reinstated.

CONCLUSION

Nothing in the First Amendment bars a federal court from holding a newspaper in criminal contempt for willfully disobeying a temporary restraining order. The deliberate refusal to obey an order of a court without first testing its validity through established processes directly undermines the judiciary's ability to adjudge legal disputes fairly and in a responsible manner.

In the instant case, the Journal acted at its peril in deliberately choosing to publish in the face of a lawfully issued court order forbidding it to do so. The Journal's conduct displayed a total lack of respect for the judicial process and is not mitigated by any press freedoms it may enjoy. As valuable as those freedoms are:

> The most prized liberties themselves presuppose an independent judiciary through which these liberties may be vindicated. When . . . an appeal is made to the law, the issue must be left to the judgment of

courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

United States v. United Mine Workers, 330 U.S. at 311 (Frankfurter, J., concurring).

The First Circuit's decision should be reversed and the criminal contempt sentences imposed by the district court should be reinstated.

Respectfully submitted,

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